ILPA Briefing on the Government amendements to clause 14.

Clause 14 introduces changes to the appeal system which are not only unnecessary but which damage the prospects of an appellant being properly represented and having a just determination of his appeal.

Statutory review by the High Court under the proposed system mirrors existing provisions. Taking the filter of the Tribunal making preliminary decisions into account [1] the new s103A scheme of statutory review is very similar to s101 of the 2002 Act. Section 101 was only introduced in April 2003, but there has been general satisfaction from the judiciary with its operation. The President of the Immigration Appeal Tribunal recently described the process of Statutory Review as 'speedy and inexpensive' and said 'First indications of the operation of the new process are encouraging…'.[2] Despite record numbers of asylum appeals there were fewer than 300 applications for statutory review in 2003, and since April 2004 the rate of application has been falling.

Yet clause 14 tightens the statutory regime without explanation. A government amendment laid for Report restores the current 'arguability' threshold for statutory review decisions, and is to be welcomed. But other aspects of the new regime remain a cause for great concern:

1. **The 5 day time limit.** The time limit for a s103A application is to be 5 days only [3], compared with 14 days under the s101 scheme. The reduction is unjustified and potentially disastrous. Even 10 days is a tight timetable because applicants frequently need a second opinion at this stage and new lawyers – often including counsel instructed for the first time - need time to review an entire case from scratch. They may need to meet witnesses and consider a large body of evidence. Shorter time limits will mean rushed applications, making the task of the reviewer more difficult and prospects of justice for applicants more remote.

2. **Conditional fees.** ILPA has briefed separately with LAG, Justice, Liberty and BIHR opposing conditional fees on the grounds they are wholly inappropriate for human rights work, will damage the provision of legal services and access to justice, are ill-timed and unnecessary. We make all points on this issue without prejudice to our full response to any future consultation.

The courts recognise that asylum cases, by their very nature, require 'most anxious scrutiny'. ILPA considers this should be reflected in legal aid as much as the appeal system.

- With conditional fees, practitioners are asked to prejudge which cases are likely to win without regard to the consequences of the outcome for the client. They have to put a price tag on the risk of torture or death for their clients. We believe this is unfair to practitioners, but potentially disastrous for clients.

- The decision on credibility, which is often decisive in an appeal, is notoriously difficult to predict, as it depends on the performance of the client as a witness and the individual approach of the adjudicator. It must be borne in mind that one adjudicator's refugee could be another's bogus asylum seeker.

There is no need to replace the existing system of prior funding regulated by the Legal Services Commission, since the LSC only grants funding after consideration of the facts and merits of each case - including the prospects of success and ultimate benefit. Additionally there is an array of recent statutory and LSC innovations to prevent abusive applications, but which have not been taken into account by those advocating conditional fees:

- Decisions on appeal funding have since April 2004 been taken in-house by the LSC. When justifying conditional fees the Lord Chancellor relied on figures from 2003 when such decisions were devolved out to practitioners.

- About 97 of the poorest quality law firms have had their LSC contracts terminated as of April 2004.

- There will be a compulsory Law Society accreditation scheme for immigration solicitors from April 2005.

- The Nationality Immigration and Asylum Act 2002 gave both the High Court and Tribunal power to issue certificates of no merit[4] notifying the LSC of abusive cases.

Faced with low rates of remuneration, vilification from the press and elements in the government and constant change in LSC regulations, morale among practitioners is rock bottom. Several high profile quality firms have left the field in recent months, and there is growing evidence of serious under provision of advice in many areas. Keith Vaz MP summarised evidence taken recently by the Commons Constitutional Affairs Committee as follows: 'some very, very good practitioners were giving up on legal aid because it just did not pay them, ... nobody was going to take over the work and therefore large parts of the... borough [of Hackney] were not going to be covered...'[5] Another CAC member, Anne Cryer MP, described her constituency in Bradford as an 'immigration advice desert'. Yet more radical change at this point is a dangerous innovation. Time is needed for these changes to bed down and for the profession to adapt to them.

ILPA believes the conditional fees provision should be deleted from the bill. Only if this is not achievable, we seek modifications to create a presumption of payment where there is a reasonable belief for the case succeeding, and a 2 year moratorium on consultation and implementation to allow recent rapid developments to be evaluated.

3. The single tier Tribunal: ILPA can see no reason to believe that the quality of first decision making by the new Tribunal will be an improvement on current Adjudicators.

- In the great majority of appeals the same personnel will make decisions in the same way, but with reduced opportunity for their errors to be remedied in practice. Under the single tier an appeal can be reconsidered only once, limiting the prospects of remittal for a fresh full hearing on the facts.[6] This will exacerbate the effects of the current 'listing lottery' – where an appellant's chances are determined largely by the individual approach of the Adjudicator who is chosen to hear the case.

- Furthermore, we are concerned that the independence of members of the Tribunal may be compromised under the unified arrangement, since senior

members will supervise the lower ranks. This is of particular concern in an area such as immigration where political concerns are so prominent and the Home Secretary is habitually denouncing judicial decisions in public.

_Improving decisions first time – a revised role for lay members

ILPA believes there is an opportunity to improve initial decision making by providing for two suitably qualified lay members to sit with the legally qualified IAT chair at first hearings. Lay members currently sit in the second tier Tribunal which primarily decides legal issues, rather than in the first tier which generally makes primary findings of fact. In ILPA's view the lay members often make valuable contributions to hearings and can add balance and a breadth of experience to the panel. The unified system creates practical and legal impediments which make it all the more important that decisions are right first time. Yet lay members are to be abolished.[7]

We endorse the views of Lord Kingsland as expressed in the Committee debate: *It is essential that the Government ensure that each tribunal has at least two and normally three members to consider all the factual aspects of an asylum seekers application. The issue of credibility, more than any other issue determines the outcome of tribunal decisions. In this regard, I support what I take to be the proposals of..Lord Goodhart, that at least one, and preferably two lay members should always sit when a tribunal decision is taken. Lay members are at least as well qualified as judicially qualified members to assess issues of credibility and it is unacceptable that only tone adjudicator should undertake that responsibility.*[8]

Support for this view comes from Sir Andrew Leggat's 2001 report into the Tribunal system. He suggests that lay members play an important role in 'broadening the experience that tribunals brought to bear on a decision particularly in relation to decisions of fact', and that appropriately qualified lay members helped users cope with the stressful experience of appearing before a tribunal.[9] *Complex factual issues are a regular feature of immigration and asylum cases, ranging from the circumstances of an alleged marriage or the obligations within an extended family abroad to the political situation in a country from which asylum is sought. Many cases would not be suitable for a hearing by a chairman, even legally qualified, sitting alone and expert members should be used when appropriate at this level.*

> We advocate that the lay members should be recruited carefully to bring particular skills and insights into the facts of appeals. Again we endorse Leggat, who said: *In setting the qualifications for appointments to the tribunal, and to sit in particular cases we believe that care should be taken to ensure that those selected bring relevant experience and skills to the decisions to be taken, such as knowledge of conditions in particular countries concerned or of refugees.*[10]

As to cost implications, we again agree with Leggat's view: *We think that additional expenditure will be significantly out-weighed by: an improvement in initial decision making and therefore fewer appeals, a clearer focus in second tier appeals on legal issues; and there for a progressive reduction in the number of challenges to cases throughout the IAA and in the courts.*[11]

Amendments:

Time limits

1. ILPA supports Lord Goodhart and Lord McNally's amendments 44 and 45 which

ensure the current 14 day deadline for statutory appeal is effectively retained.

Conditional Fees

2. ILPA supports the principal behind Lords Goodhart and McNally's amendment 47. We support the deletion of all of 103 D [amendment 47] in particular because the timing of the proposals.

3. We also propose the following amendment aimed at ensuring that no conditional fees are introduced for at least 2 years to ensure current changes are properly evaluated beforehand:

   Page 16, line 6, at end insert:

   "but such regulations shall not take effect before a period of 2 years after the date of enactment of this Act and the power shall not be exercised without such regulations being in place"

4. If there is to be a conditional fee arrangement, then surely the starting point should be, barring exceptional circumstances, that a successful application for an order for reconsideration should be paid, without reference to whether the outcome is affected. We agree with Lord Kingsland when he stated '*if an advocate were reasonably satisfied that there were reasonably arguable grounds for believing that an error of law had been made, then that, in principle ought to be enough to ensure a grant of legal aid.*'[12]

We there fore support the principle behind Lords Goodhart and McNally's amendment 48, particularly extended further to create a duty on the Tribunal to give reasons for a decision that an application had no reasonable grounds and withholding costs was therefore appropriate. [see separate briefing with LAG/Liberty/Justice/BIHR]

Lay members:

5. ILPA supports the amendments of Lord Kingsland and Baroness Anelay of St Johns which allow for the appointment of lay members and provides for 3 members of the Tribunal to hear appeals in normal circumstances.

6. However consequence of this would be to deny the 103A statutory review in most cases as it is excluded from application to decisions of the Tribunal sitting as panel of 3 members. We therefore would propose the following additional amendment:

Page 14 lines 20 and 21, delete all.

2.6.04

ILPA Billteam

Telephone 020 7490 1553

Or 07963 890 740

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[1] new clause 30 of schedule 2

[2] Sir Duncan Ouseley evidence to the Commons Constitutional Affairs Committee, January 2004.

[3] New s 103A clause 3 (a)

[4] s101(3) (d) and s106 (3) (f) of the NIAA 2002.

[5] Commons Constitutional Affairs Committee 27.4.04 – uncorrected transcript page 15-16

[6] An appeal can be subject to s103A statutory review only once – see new section 103A (7) (b).

[7] Schedule 1 section 2.

[8] Hansard 4May 2004 Lords col 1016

[9] Tribunals for users, one system one service, HMSO 2001, para 7.19.

[10] ibid – page 153, recommendation 300

[11] ibid - page 153.

[12] Hansard Lords 4 May 2004 col 1017